Supreme Court, U.S.
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No. 92-443

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

James M. Elfelt, Joseph P. Elfelt
Anthony J. Elfelt, Lawrence W. Elfelt,
Paul G. Elfelt, David C. Elfelt
and Steven M. Elfelt,

Petitioners

v.

Albina Cooper, Respondent

on Writ of Certiorari to the Supreme Court for
the State of Wisconsin

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. THE 1988 AMENDMENT TO THE INTERNAL REVENUE CODE DOES NOT AFFECT THE SIGNIFICANT NATIONAL IMPACT OF THE QUESTIONS PRESENTED TO THIS COURT FOR REVIEW.

Respondent argues that the amendments to 26 U.S.C. § 6334[1], which enumerates property exempt from levy, renders the impact of any review by this Court minimal and unlikely to affect other litigants. (Respondent's Brief in Opposition at 6-8.) Respondent argues that because of the amendment, which was effective June 30, 1989, an administrative sale of a principal residence by the Internal Revenue Service is unlikely to ever occur again.

The amendment to § 6334 of the Internal Revenue Code added subsections (a)(13) and (e) which provide:

> There shall be exempt from levy–
>
> . . . .
>
> (13) **Principal residence exempt in absence of certain approval or jeopardy.** Except to

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[1] Respondent's Brief in Opposition incorrectly identifies the codification as 26 U.S.C. § 6332(a)(13).

> the extent provided in subsection (e), the principal residence of the taxpayer (within the meaning of § 1034).
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> . . . .
>
> (e) **Levy allowed on principal residence in case of jeopardy or certain approval.** Property described in subsection (a)(13) shall not be exempt from levy if–
>
> (1) a District Director or Assistant District Director of the Internal Revenue Service personally approves (in writing) the levy of such property, or
>
> (2) the Secretary finds that the collection of tax is in jeopardy.

Since the enactment of 26 U.S.C. § 6334(a)(13), the Internal Revenue Service in Wisconsin has continued to use the administrative seizure and sale provisions of the Internal Revenue Code, Sections 6331-6339, to satisfy tax liabilities of taxpayers. The IRS has administratively seized and sold jointly-held principal residences and homesteads in Wisconsin on numerous occasions, with the written approval of the District Director or Assistant District Director of the Milwaukee District pursuant to 26 U.S.C. § 6334(e), and intends to do so in the future. (Statement of Ursula Kordasiewicz-Wastian, Chief of the Special Procedures Staff of the Milwaukee District of the Internal Revenue Service, reproduced in the Reply Appendix at 101.)

Respondent attempts to mislead the Court in her implication that an administrative sale of a taxpayer's homestead is now prohibited. On the contrary, had the respondent's husband's interest in his jointly held homestead property been seized on or after July 1, 1989, either the IRS District Director or Assistant District Director could have provided the required written approval to use essentially the same administrative seizure and sale collection method which was used in 1985.

Homestead property has been administratively seized and sold since 26 U.S.C. § 6334(a)(13) took effect. The IRS intends to continue to use this administrative collection tool against homestead property. It is therefore abundantly clear that a decision by this Court will not be a "mere esoteric exercise", (Respondent's Brief in Opposition at 8), but will be a vitally significant determination of how federal statutes apply to facts which have occurred since July 1, 1989, and are most assuredly bound to recur. These facts will recur in Wisconsin and will likely recur in every state with homestead laws, giving cause for further litigation.

This case is packed with precedential value and substantial national impact, the respondent's assertions notwithstanding. The likelihood of similar litigation concerning validity of a purchaser's interest reaching both

federal and state courts is especially high, given the fact that at least twenty-seven states have homestead spousal consent laws similar to Wisconsin's.[2] Indeed, the United States District Court of Iowa noted the possibility of the very issue that is presently before this Court.

> The court feels that the Government may well be hard-pressed to find a buyer willing to purchase the equitable interest of Mr. Bachman, in the homestead which, in all likelihood, would be sold without the consent of Mrs. Bachman, and then attempt to collect on his purchased interest when the homestead is sold or passed through Mrs. Bachman's

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[2] Alabama Code § 6-10-3; Alaska Statutes § 34.15.010; Arizona Revised Statutes § 33-452; Arkansas Code § 18-12-403; California Civil Code §§ 5125, 5127; Colorado Revised Statutes § 38-41-202; Florida Const. Art. 10, § 4(c); Idaho Code § 55-1006; Illinois Revised Stats. § 110 para. 12-904; Kansas Const., Art. 15 § 9; Kentucky Revised Stats. § 427.100; Michigan Compiled Laws Annotated §§ 557.201, 557.203; Minnesota Stats. Ann. § 507.02; Mississippi Code § 89-1-29; Missouri Revised Stats. § 513.475; Montana Code Annotated § 70-32-301, 302; Nebraska Revised Stats. §§ 115.040, 123.230; New Hampshire Revised Stats. Ann. c. 480, § 5-a; New Mexico Stats. § 40-3-13; North Carolina Const., Art. X, § 2(4); North Dakota Century Code § 47-18-05; Oklahoma Stats. § 16-4; South Dakota Codified Laws § 43-31-17; Utah Code Annotated § 78-23-4(4); Vermont Statutes Annotated § 27-141; Washington Revised Code § 6.13.060; Wyoming Stats. § 34-2-121.

> estate. *The validity of the purchaser's interest may well be challenged as having failed to comply with Sec. 561.13.*[3] *United States v. Bachman*, 584 F. Supp. 1002, 1005 (S.D. Iowa 1984). (Emphasis added.)

The court in *Bachman*, gave no indication as to what the outcome of such a challenge might be. However, the issue is before this Court precisely because in this case, the IRS was *not* hard-pressed to find a buyer willing to purchase an undivided one-half interest in homestead property. It also stands to reason that the issue of alienation of *one* spouse's interest in jointly held homestead property by administrative seizure and sale without both spouse's consent is likely to revisit this Court, unless review is granted.

Respondent also attempts to mislead this Court into believing that the petitioners' conceded in their Brief In Opposition to Review by the Wisconsin Supreme Court that this case had little precedential value. (Respondent's Brief In Opposition at 8.) The respondent quotes a portion of

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[3] Iowa law prevents either spouse from conveying his or her interest, either voluntarily or involuntarily, for the benefit of creditors or for any other reason without the approval of the other spouse. *United States v. Bachman*, *supra* at 1004.

the petitioner's filing in the Wisconsin Supreme Court, but quotes it out of context. The petitioners stated in their Response to the Petition for Review by the Wisconsin Supreme Court:

> The Elfelts agree that the question presented is a novel one, *as far as state courts are concerned*. However, it will have little, if any, statewide impact, nor is it likely to recur unless resolved by the [Wisconsin] Supreme Court. *A prudent joint tenant who finds herself in a situation similar to Albina would invoke the statutory procedures set forth in Sections 6343(b) and 7426 of the Internal Revenue Code to protect their interest.* (Response to Petition for Review filed in the Wisconsin Supreme Court at 2. Emphasis added.)

Had the Wisconsin Supreme Court correctly decided the issues presented to it, it would have had little precedential value. However, the decision of the Wisconsin Supreme Court will now have significant nationwide impact and is likely to be cited as precedential authority in both federal and state courts, unless this Court grants the Petition for Writ of Certiorari.

II. THE WISCONSIN SUPREME COURT DID NOT HAVE THE JURISDICTIONAL AUTHORITY TO VOID AN ACT OF THE INTERNAL REVENUE SERVICE.

Respondent argues that the Wisconsin Supreme Court did not "void an act" of the Internal Revenue Service or otherwise abrogate the Internal Revenue Code. (Respondent's Brief in Opposition at 9.) However, the Wisconsin Supreme Court certainly did "void an act" of the Internal Revenue Service. The Wisconsin Supreme Court held that the IRS had no authority to sell an undivided one-half interest in homestead property held in joint tenancy. The Wisconsin Supreme Court cited § 706.02(1)(f) of the Wisconsin Statutes and stated, "There is no way to convey any interest in a jointly-held spousal homestead in Wisconsin without both spouses' consent except through court proceedings, such as a divorce, bankruptcy, or lien foreclosure." *Elfelt v. Cooper*, 168 Wis. 2d 1008, 1021-22, 485 N.W.2d 56 (1992); Appendix at 115-117. The Wisconsin Supreme Court also stated, "we hold that the IRS did not validly convey any interest in the homestead to the Elfelts." *Id.* at 1023; Appendix at 119. The Wisconsin Supreme Court held that the District Director's Quit Claim Deed was invalid because it was not consented to by the

respondent. It, therefore, clearly did void an act of the Internal Revenue Service.

The Wisconsin Supreme Court and the respondent rely on *Popp v. Eberlein*, 409 F. 2d 309 (7th Cir. 1969) in stating that the state court did have the jurisdictional authority to invalidate the IRS sale. *Elfelt v. Cooper, supra* at 1016-17; Appendix at 109; Respondent's Brief In Opposition at 10. However, what the Wisconsin Supreme Court and respondent have overlooked is that the Court of Appeals in *Popp* specifically cited Article VI of the United States Constitution and stated that "[t]he state court was bound to apply federal law in deciding the dispute." *Popp v. Eberlein, supra* at 311. The petitioners submit that the Wisconsin Supreme Court only had the jurisdictional authority to *apply* federal law in determining the consequences of the administrative sale of the property rights of Mr. Cooper created under Wisconsin law. However, the petitioners further submit that the Wisconsin Supreme Court did not have the jurisdictional authority to refuse to apply the clear and unambiguous authority granted to the IRS by the Internal Revenue Code by applying state law, rather than federal law, to determine the IRS' authority.

III. THE DECISION OF THE WISCONSIN SUPREME COURT CONFLICTS WITH THE INTERNAL REVENUE CODE AND RELEVANT FEDERAL COURT DECISIONS.

The Wisconsin Supreme Court held that the only way the IRS might validly have conveyed an interest in the Coopers' jointly-held spousal homestead was to proceed under 26 U.S.C. § 7403. *Elfelt v. Cooper*, 168 Wis. 2d 1008, 1023, 485 N.W.2d 56 (1992); Appendix at 118. However, the court apparently overlooked 26 U.S.C. § 7402(a) which states in relevant part, "The remedies hereby provided are *in addition to and not exclusive of* any and all other remedies of the United States in such courts *or otherwise* to enforce such laws." (Emphasis added.) Petitioners have been unable to locate any court decision, federal or state, which has held that § 7403, in any situation, is exclusive of the administrative sale provisions of Sections 6331-6339.

Respondent argues that the administrative levy procedure is only a provisional remedy which does not determine the rights of third parties. (Respondent's Brief In Opposition at 13-16.) Respondent cites *United States v. National Bank of Commerce*, 472 U.S. 713 (1985) and *Rodriguez v. United States*, 629 F. Supp. 333 (N.D. Ill. 1986). While it is true that in those cases the courts held that §

6331 is a provisional remedy, which does not determine the rights of third parties, nothing in those decisions held that the IRS was precluded from selling an undivided interest in property pursuant to the plain and unambiguous language of § 6335 following the provisional remedy of the levy pursuant to § 6331. 26 U.S.C. § 6339(b) sets forth the legal effect of the deed of real property sold pursuant to § 6335.

> In the case of the sale of real property pursuant to § 6335-
>
> . . . .
>
> (2) **Deed as conveyance of title.** If the proceedings of the Secretary as set forth have been substantially in accordance with the provisions of law, such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

It is true that the administrative levy and sale by the IRS did not determine the rights of any third parties in the property. That determination was left to be decided in this action and it was correctly decided by the trial court and the Wisconsin Court of Appeals that the respondent's rights were as the owner of an undivided one-half interest in the property which was subject to partition.

Contrary to respondent's arguments, the Wisconsin Supreme Court's decision *does* conflict with the Eighth Circuit Court of Appeals decision in *Herndon v. United States*, 501 F.2d 1219 (8th Cir. 1974). The Wisconsin Supreme Court, went beyond applying Wisconsin law to determine the *nature* of the property right that a spouse owns in a homestead in Wisconsin. It also relied on Wisconsin law, rather than federal law, to determine the *consequences* attached to the property right. However, *Herndon* held "that even if state laws do create a property interest pursuant to a homestead exemption law, the United States can still levy upon that property." *Herndon v. United States, supra* at 1221.

IV. THE ADMINISTRATIVE LEVY PROCEDURES, AS APPLIED, ARE CONSTITUTIONAL.

Petitioners only addressed the constitutionality of the administrative levy procedures because, even though the Wisconsin Supreme Court stated that it did not reach Mrs. Cooper's constitutional arguments, it then proceeded to state its reasons why it was doubtful of the constitutionality

of the actions of the IRS in this case. *Elfelt v. Cooper, supra* at 1019 n. 3; Appendix at 111-12.[4]

The record in this case does not support the Wisconsin Supreme Court's comment that the respondent was not given adequate notice by the IRS. The respondent does not take issue with the petitioners' statement in their Petition for Writ of Certiorari that the parties never litigated the issue of whether or not Mrs. Cooper received actual notice of the levy and sale, nor with the statement that, nevertheless, Mrs. Cooper did have actual knowledge of the levy and sale.

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[4] Petitioners fail to understand why respondent believes that they have mischaracterized the respondent's constitutional argument as an attack on the facial constitutionality of the administrative levy procedure. (See Respondent's Brief In Opposition at 23.) Petitioners never mentioned in the Petition for Writ of Certiorari what the respondent's constitutional argument was. (See Petition for Writ of Certiorari at 38-41.) The petitioners' heading to the section in the Petition for Writ of Certiorari regarding the constitutional arguments states, "The administrative levy procedures, *as applied*, are constitutional." (Emphasis added.)

V. RESPONDENT MISCONSTRUES SECTION 6335(C) OF THE INTERNAL REVENUE CODE.

26 U.S.C. § 6335(c) provides:

> If any property liable to levy is not divisible, so as to enable the secretary by sale of part thereof to raise the whole amount of the tax and expenses, the whole of such property shall be sold.

Respondent argues that the real estate owned by Mr. and Mrs. Cooper was not divisible and, therefore, since the Internal Revenue Service did not sell both of their interests in the property, the sale was invalid. The respondent misconstrues § 6335(c).

To determine what Congress intended when it referred to whether or not property is divisible, one need only look to the language of § 6335(c) itself. Property liable to levy is not divisible when it does not "enable the secretary by sale of a part thereof to raise the whole amount of the tax and expenses." If the IRS can raise the whole amount of the tax and expenses, § 6335(c) dictates that only part thereof be sold. In this case, the sale of Mr. Cooper's part of the real estate did enable the secretary to raise the whole amount of the tax and expenses. Therefore, the IRS was not required to sell the whole property as contended by respondent.

It must be noted that § 6335(c) only uses the term "property". Congress did not use the phrase "property and rights to property" as it did in other sections of the Code. *See* 26 U.S.C. §§ 6321, 6331 and 6332. The petitioners submit that in § 6335(c) Congress was referring to whether or not the "property" could be sold in parcels to satisfy the tax.

The case of *McAndrews v. Belknap*, 141 F.2d 111 (6th Cir. 1944) involved an action to quiet title instituted by the purchaser from the United States of two parcels of land which had been sold to the United States for taxes due. One of the arguments was that the sale was improper in that there were not two separate offers for the sale of two tracts of land pursuant to what was at that time § 3701(d) of the Internal Revenue Code. That section provided that when real estate seized consists of several distinct tracts or parcels of land, there shall be an offer of each tract or parcel for sale separately. The court stated that the purpose of this provision was to compel the sale of only so much land as may be necessary to satisfy the taxes. *Id.* at 114. The court stated that its conclusion was strengthened by the consideration of what was then § 3712 which held "when any property liable to distraint for taxes is not divisible, so as to enable the collector by sale of a part

thereof to raise the whole amount of the tax, with all costs and charges, the whole of such property shall be sold." The court held that in construing similar statutes the Supreme Court has declared:

> That when it does not affirmatively appear in a sale of the entire land that no one would bid the amount of the taxes and costs for less than the whole, or that the land was incapable of division, the sale is invalid. *Id.* at 115.

The court held that because the land was described as two separate tracts, it affirmatively appeared that the land was capable of division. *Id.* Therefore, because the land was capable of being divided, the rights of the debtor were prejudiced when the property was sold as a whole.

The court's discussion in *McAndrews* makes it clear that when the Internal Revenue Code is referring to "divisible", it is referring to the capability of the property to be divided into parcels and, therefore, the IRS properly sold the whole of Mr. Cooper's interest in the property.

CONCLUSION

The Internal Revenue Code clearly and unequivocally provides that the Internal Revenue Service can collect taxes owed to the United States by selling a delinquent taxpayer's interest in real estate by *either* one of

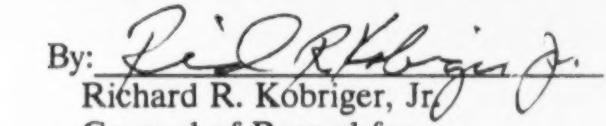
two methods: administrative seizure and sale or judicial foreclosure. Congress made no distinctions that there may be situations where *only* judicial foreclosure can be used. The only distinction is that if the IRS wants to foreclose a third party's right, title and interest in the property, it must be done by judicial foreclosure. However, if the IRS merely wants to sell the right, title, and interest of the delinquent taxpayer, without foreclosing the rights of third parties, it may do so by virtue of the administrative levy and sale procedures.

This case will give the Court the opportunity to determine whether the laws of any state can somehow preclude the United States from proceeding with the administrative seizure and sale procedures when no such exception exists in federal law. Resolving the issues presented will clarify the United States' ability to lay and collect taxes pursuant to Article XVI of the amendments to the United States Constitution without interference from state laws, either statutory or judicial, pursuant to the Supremacy Clause of Article VI of the Constitution. This Court has an opportunity to clearly establish that the Supremacy Clause is still potent in its application to delinquent taxpayers. While the Court may sympathize with the burden left to the respondent by her spouse, to allow

the decision of the Wisconsin Supreme Court to stand without review would leave unsettled an important question of federal law which has not been, but should be, settled by this Court.

For all of the foregoing reasons, it is respectfully requested that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,
CRAMER, MULTHAUF & HAMMES

By: 
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No. 92-443

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1992

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JAMES M. ELFELT, et al, :
:
Petitioners, :
v. : Case No. _____
ALBINA COOPER, :
:
Respondent. :
: : : : : : : : : : : : : : : : : : : :

State of Wisconsin)
) ss.
County of Milwaukee)

I, Ursula Kordasiewicz-Wastian, duly state the following:

1. That I am the Chief of the Special Procedures Staff of the Milwaukee District of the Internal Revenue Service located in Milwaukee, Wisconsin.

2. In such capacity, I have the responsibility of overseeing the technical aspects of Internal Revenue Service collection matters including bankruptcies, civil litigation issues, judgements, offers in compromise and administrative seizures of property.

3. I have been asked to provide a statement as to the practices of the Milwaukee District office regarding the seizure of principal residences of taxpayers who have incurred federal tax liabilities and failed to satisfy same after notice and demand by the Internal Revenue Service.

4. In making this determination I have reviewed some records of the Internal Revenue Service relating to seizures and sales of principal residences, including homesteads, of taxpayers in the State of Wisconsin for the past several years.

5. Since the enactment of I.R.C. § 6334(a)(13) the Internal Revenue Service in Wisconsin has continued to use the administrative seizure and sale provisions of the Internal Revenue Code I.R.C. § 6331 through 39 to satisfy tax liabilities of taxpayers. The Service has administratively seized and sold jointly held principal residences and homesteads in Wisconsin on numerous occasions, with the written approval of the District Director or Assistant District Director of the Milwaukee District pursuant to I.R.C. § 6334(e), and intends to do so in the future.

CHIEF SPECIAL PROCEDURES

Date: Oct. 28, 1992 By:/s/Ursula Kordasiewicz-Wastian